IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-886

THE UPJOHN COMPANY AND GERARD THOMAS VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL, *Petitioners,*

v.

UNITED STATES OF AMERICA AND DAVID NOWAK, SPECIAL AGENT, INTERNAL REVENUE SERVICE, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business and professional organizations in the United States. Its current membership exceeds 96,000 members, including over 92,000 corporations, partnerships and sole proprietorships, as well as over 4,000 state and local chambers of commerce and trade associations.

The Chamber regularly represents its members' interests in litigation matters before the Courts, the United States Congress, the Executive Branch and Federal Regulatory Agencies. Such representation constitutes a significant aspect of the Chamber's activities and in-

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule No. 42(2).

cludes participation as an *amicus curiae* in a wide spectrum of cases before this Court.[2]

The question before the Court in the instant case is whether the Court of Appeals for the Sixth Circuit erred in holding that only the senior management of a corporation is closely enough identified with the corporation as a whole to invoke the corporation's attorney-client privilege. This Court has also been asked to decide whether the lower court erroneously held that attorney notes and memoranda that otherwise meet the criteria of the work-product doctrine, which are the subject of an IRS summons, are not protected from disclosure by the work-product doctrine.

The instant case is of vital concern to the Chamber and its numerous corporate members who regularly employ attorneys to provide legal advice to their officers and employees. It cannot be gainsaid that Americans increasingly adopt legal approaches for resolving conflicts that have traditionally been considered non-legal in nature.

Corporations, perhaps more than other entities, require legal advice on a daily basis to comply with the myriad of legal requirements which permeate every aspect of their operations, from the mundane to the very complex.

The concern of the Chamber and its corporate members is that the narrow application that the lower court accorded the attorney-client privilege and the work-product doctrine will reduce them to mere nullities, thereby depriving corporations and their at-

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[2] *See, e.g., Whirlpool Corp.* v. *Ray Marshall,* _____ U.S. _____, 63 L.Ed.2d 154 (1980); *Chrysler Corp.* v. *Brown,* _____ U.S. _____, 60 L.Ed.2d 208 (1979); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978).

torneys of countervailing desirable objectives that the doctrines were designed to achieve.

SUMMARY OF ARGUMENT

I

Open and free communication between attorneys and their clients is, and has always been, recognized as a paramount prerequisite to the success of the legal system. Moreover, it has long been recognized that the only way in which to assure candidness in the relationship is through guaranteeing that such communication remains confidential. This guarantee, the attorney-client privilege, is grounded in practicality to protect all clients, including corporations. Unfortunately, the decision of the Court below, which limits the privilege to a narrowly defined "control group" goes a long way toward depriving corporations of the time-honored right to confidentiality.

II.

The Sixth Circuit's decision, applying the narrowly described "control group" test, comes at a time when all indicators demonstrate that it will ill serve the legal system and fail to achieve the objectives underlying the attorney-client privilege. The corporate form of doing business has grown in this century by leaps and bounds, and has become the dominant client in today's business environment.

The corporation, has grown from a small, highly centralized entity to a highly divisionalized one with decision making dispersed both horizontally and vertically; and, governmental bodies, at all levels, have imposed increased regulations on all forms of business, vir-

tually guaranteeing the need for greater involvement by lawyers in the corporate decision making process.

III

The Sixth Circuit's decision is based upon two mistaken premises; first, that corporate employees seek legal advice to shield from discovery their thought processes, and, second, that the search for truth in the adversarial process eclipses other societal interests.

The first premise totally ignores the practicalities of modern management. Corporate boards of directors and officers rarely, if ever, are so personally involved with corporate affairs so as to ensure the give-and-take vital to the attorney-client relationship. Rather, the privilege should appropriately apply to the entire class of corporate decision makers who are given, and who exercise discretionary authority within their respective corporations.

The second premise totally ignores the societal interest in encouraging citizens, including corporations, to comply with ever changing, complex laws. Various government agencies and officials have conceded that the effectiveness of many laws depends upon self-policing. And, a Supreme Court ruling which would deprive middle and lower level corporate employees of the privilege's protective mantle would only ensure their reluctance to confer with corporate counsel on compliance issues, thus substantially undermining the success of the government's regulatory efforts.

IV

Today's corporate counsel must act as advisor, fact-finder and advocate on behalf of the client's interests.

The Sixth Circuit's "control group" test substantially inhibits the effective discharge of these responsibilities.

Preventive law constitutes a major percentage of the attorney's practice. Unless corporate employees at various levels of operations who make decisions on a daily basis, have timely access to legal advise, the practice of preventive law suffers.

The attorneys's role as factfinder is a natural outgrowth of his responsibility to keep his corporate client free of legal entanglements by assuring its compliance with the law. A lawyer who is ignorant of the facts cannot intelligently advise. As discussed *supra,* many, if not most, regulatory laws depend upon voluntary compliance, an objective clearly within the public interest.

Finally, we submit that a broader rule than that enunciated by the Sixth Circuit would promote full attorney-client communication, an acknowledged desirable objective, without inhibiting the operation of the adversarial process.

V

The second issue before this Court, is whether the work-product privilege may be invoked in response to an administrative summons issued in an IRS investigation. The Chamber respectfully suggests that the same policy considerations which make the privilege applicable to civil and criminal litigation, and grand jury proceedings, make it equally applicable to the IRS administrative proceeding. First, the process is clearly adversarial; and, criminal or civil litigation may evolve from the investigation. Second, this proceeding is similar

to the grand jury proceeding, in which the courts have held that the privilege is applicable. And, third, constitutional guarantees of due process and effective assistance of counsel require the application of the principle.

ARGUMENT

I.

The attorney-client privilege has for centuries been recognized in the English and American legal systems as a vehicle for encouraging full communication between legal advisors and clients. Originally conceived to protect the inherent honor in the business of lawyering, the privilege belonged to the attorney.[3]

Over the years the traditional explanation for the privilege yielded to a utilitarian one[4] and the privilege is today "based on the theory that although certain confidential communications may have evidentiary relevance, 'their revelation will impair the social good derived from the proper performance of the functions of lawyers for their clients' " (footnote omitted).[5]

The attorney-client privilege protects not only communications flowing from the client to the attorney, but also communications flowing from the attorney to the client, if revelation of the attorney communication would necessarily reveal the client communication. *Natta* v. *Hogan,* 392 F.2d 686, 692-3 (10th Cir. 1968). It exists

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[3] Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement,* 91 Harv.L.Rev. 464 (1977); comment, *The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation,* 39 Fordham L.Rev. 280 (1970).

[4] 91 Harv.L.Rev. at 465.

[5] 39 Fordham L.Rev. at 281.

regardless of whether litigation is anticipated. *Id.* at 692. And, there is no question that a corporation enjoys the protection of the attorney-client privilege. *Bell* v. *Maryland,* 378 U.S. 226, 263 (1964); *Radiant Burners, Inc.* v. *American Gas Association,* 320 F.2d 314 (7th Cir. 1963), *cert. denied,* 375 U.S. 929 (1963).

According to the ABA Code of Professional Responsibility, "a lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative or other person connected with the entity." Ethical Consideration 5-18. The Code, however, offers no assistance in determining who may speak for the corporation to its counsel, and therefore, invoke the privilege.

The Sixth Circuit, along with other courts, has held that only a small group consisting of corporate officers and directors (the "control group") are sufficiently identified with the corporation to invoke the attorney-client privilege. *United States* v. *Upjohn,* 600 F.2d 1223 (1979).[6]

It is the Chamber's contention that, for the reasons set forth in this brief, the holding of the court below totally ignores the practical realities of the flow of information and the decision making process in modern day corporations, places great importance on the discovery process at the expense of all other societal interests, and that this myopic viewpoint renders the privilege virtually meaningless in the corporate context.

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[6] *See e.g., In Re Grand Jury Investigation,* 599 F.2d 1224 (3rd Cir. 1979); *contra, Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1977) (*en banc*).

II.

Two intertwined developments in the law and in the structure of American corporations best illustrate why the "control group" test is inadequate to achieve the objectives underlying the attorney-client privilege. They are the growth of the corporation and the increased government regulation of corporate affairs.

The lawyer in pre-twentieth century America worked in the "golden age of advocacy."[7] In that era, the vast majority of clients were individuals who sought legal advice only after difficulties had progressed to the litigation stage.[8] In this "pre-industrial age," problems related to the application of the privilege, such as those presented by this case, were non-existent.

The Industrial Revolution, however, induced significant changes in the practice of law. The corporation replaced the sole proprietorship as the dominant business entity.

> The impact of the corporation on the legal profession was immense. Increasingly the function of the lawyer was to construct corporate institutions and empower them to perform the important tasks for which they had been created. In the process he had to foresee the problems that corporations would face. No longer could the lawyer be content to rely on ancient postulates and precedents; he was required to use his imagination to make thoughtful preparations for the future to do a constructive job. His attention was more and more given to preventing litigation, anticipating troubles, avoiding dif-

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[7] Gossett, *The Corporation Lawyer's Social Responsibilities*, 60 A.B.A. Jour. 1517 (Dec. 1974).

[8] *Ibid.*

> ficulties. Instead of looking backward, his responsibility was to look ahead.

Gossett, *The Corporation Lawyer's Social Responsibilities,* 60 A.B.A. Jour. 1517 (Dec. 1974).

Significantly, early corporate management was highly centralized. However, by the end of World War II, the tremendous growth and the increasing complexity in corporations, caused by diversification, led to "divisionalization."[9] Under this management model "[e]ach division of the corporation is a self-sustaining, autonomous unit with a manager who, like the head of a company, is accountable for its performance."[10]

As a corollary to divisionalization, the number of corporate managers increased geometrically and a cadre of officials was created with final responsibilities for various segments of the corporation's operations. In the modern corporation, then, there is no single decision maker who has both the authority and responsibility to make all decisions for the corporation. Rather, decision makers exist along a vertical axis, and their authority depends upon the importance of the issue to overall corporate affairs.

Concomitant with this growth of the modern corporation, and the increase in the number of decision makers within the corporation, has been the growth in the number of regulatory programs developed by both federal and state governments that impact upon corporations.[11] The number and complexity of these regula-

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[9] H. Stieglitz and A. Janger, *Top Management Organization in Divisionalized Companies,* [Conference Board, Studies in Personnel Policy No. 195 (1965)].

[10] *Id.*, Chapt. 1.

[11] Rast, *What the Chief Executive Looks for in his Corporate Law Department,* 33 Bus. Law. 811, 812 (1978); FORTUNE, April 1973 at 65, 69.

tions, of necessity, have resulted in a substantial increase in the number of corporate attorneys upon whom management must rely.[12]

III.

As a result of these historical developments in the management of the modern business enterprise, as well as the growth of governmental regulation, counsel to the modern corporation has three fundamental responsibilities which are an integral part of the rendering of legal services to the client organization: legal advisor, factfinder, and legal advocate. What we will now demonstrate is that the "control group" test, as enunciated by the Sixth Circuit, subverts, rather than subserves, the discharge of these responsibilities in a manner consistent with those societal goals which underpin the privilege itself.

As previously noted, the privilege is intended to facilitate attorney-client communications in the belief that such candid and frank discussion is necessary "in the interest and administration of justice," *Hunt* v. *Blackburn,* 128 U.S. 464, 470 (1888), quoted in *United States* v. *United Shoe Machinery Corp.,* 89 F.Supp. 357, 358 (D.Mass. 1950), and thereby fulfills a socially significant function.[13] The "control group" test, however, does not further this elemental interest.

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[12] In a survey conducted by Fortune, of a cross section of top U.S. corporations, the data indicated that the annual bill for legal departments and outside counsel was $1.3 billion for the top 1300 corporations. Corporations also reported increases in legal outlays of about 75% in six years as well as increases in the number of in house attorneys of approximately one-third. In that same survey it was estimated that legal expenses for all U.S. corporations had reached approximately $3 billion. This survey was conducted in the early 1970's. Thus, due to inflation, as well as recently enacted laws and regulations, the figures today would be considerably higher. FORTUNE, *supra,* note 11.

[13] See discussion *supra* at 6-7.

The essence of the Sixth Circuit's opinion is that the search for and the discovery of the truth would be severely hamstrung, if not totally undermined, by the application of any principle other than the test endorsed in the opinion. In reaching this conclusion, however, the panel proceeds from two premises which, we believe, are not borne out by an analysis of the relationship between corporate counsel and their respective institutional clients.

First, the court assumes that a corporation's employees, whether or not they are within the "control group," as rigidly defined by the Sixth Circuit,[14] confide in legal counsel for the express purpose, *inter alia,* of seeking a protective mantle from discovery of their thought processes. And, because the motivation for seeking the advice of counsel is mixed, proponents of this view suggest that the entire claim to the privilege is thereby tainted.

Leaving aside the obvious consideration that the privilege never attaches unless the now-classic four-prong test enunciated by Judge Wyzanski in *United Shoe,* 89 F.Supp. at 358, 359 is met,[15] such an implicit

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[14] See discussion *infra* at 18.

[15] Judge Wyzanski's widely cited formulation of the test is as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

belief neither speaks well for the image of contemporary business before some courts, nor for the understanding of the realities of modern business practices by those courts.

We respectfully suggest that this Court appropriately should look to what one district judge has termed the "most well-reasoned analysis of this issue in light of the purposes of the attorney-client privilege when the client is a corporation."[16]

In *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C. 1974), the court began its analysis by "taking a common-sense look at the practicalities of the 'control group' test and its applicability in the day-to-day workings of a lawyer." *Id.* at 1164. In proceeding in this way, the court necessarily took cognizance of the decentralized management system of the modern corporation[17] when it observed:

> [I]f a corporation needs legal advice, it cannot deal solely through the chairman of the board of directors. There has to be a sufficient number of persons within a corporation who are authorized on behalf of the corporation to seek advice, to give information with respect to the rendition of advice, and to receive advice.

Ibid.[18]

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[16] *In Re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 386 (D.D.C. 1978, Richey, J.).

[17] See discussion *supra* at 9.

[18] The court ultimately concluded that the control group test, standing alone, was inadequate for determining the proper scope of the privilege, and applied the subject matter test of *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487, 491-492 (7th Cir. 1970), *affirmed per curiam by an equally divided court*, 400 U.S. 348 (1971), "as a necessary corollary to the 'control group' test." *Duplan, supra* at 1165.

As shall be discussed more fully below, the need of lower and middle management for access to legal counsel is often as acute as the need of senior management. And, advice is not sought for the purpose of evading the law, but to develop legal solutions to business problems. Indeed, more than one corporate executive has argued that what he or she desires from legal counsel is information on what can be done, not on what is prohibited.[19]

Beyond this pragmatic need for counsel, however, it should be noted that the "control group" test itself does not, contrary to the Sixth Circuit's suggestion, motivate the senior management to seek information from lower and middle managers which the "control group" members might not normally have available to them, any more than a "subject matter test encourages senior managers to ignore important information they have good business reasons to know and use." 600 F.2d at 1227.

In the first instance, many corporate decisions with significant legal implications are made by individuals who are not part of a narrowly defined "control group." And "senior managers," as a practical matter, may not be "informed" of matters concerning which the privilege may subsequently be claimed. (However, for the reasons discussed *infra,* the privilege still should be applicable.)

Second, to the extent that the information in question should be brought to the attention of the highest levels of management of the corporation, as a matter of policy, even under the most rigid "control group" test,

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[19] *A Businessman's View of Lawyers,* 33 Bus. Law. 817, 819, 827 and 831 (1978).

the privilege will be applicable, and the information will not be disclosed.

In sum, then, business realities should assuage and mute the concern of the proponents of the "control group" test that any other test will defeat the legitimate purposes of the privilege.

There is, nonetheless, a second presumption which underlies the analysis of the court below; namely, that the "search for truth" through the adversarial process has the greatest social value, and therefore takes precedence over other competing societal interests in defining the outer limits of the attorney-client privilege. This bias is both understandable and natural, for, in our Federal system, Article III mandates that courts hear only live cases and controversies,[20] dismiss mere requests for advisory opinions,[21] and, by virtue of the application of prudential concerns, eschew consideration of matters which might otherwise be postponed or resolved by some alternative method.[22] As a result, courts only view attorney-client questions and policies in the context in which they naturally arise—an adversarial proceeding in which one party seeks information which the opposing party refuses to provide.

We respectfully suggest, however, that the underlying issue here is larger in its dimensions than whether certain matters will be disclosed or barred from

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[20] *Baker* v. *Carr*, 369 U.S. 186, 205 (1962) (Federal courts cannot entertain suits "except as . . . called upon to adjudge the legal rights of litigants in actual controversies").

[21] *Alabama State Fed. of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) (Because of Article III limitations, "[T]his Court is without power to give advisory opinions.").

[22] *Cf. Schlesinger* v. *Reservists To Stop the War*, 418 U.S. 208, 215 (1974).

disclosure by application of the privilege in an adversarial setting. Rather, the issue which pervades this discussion is whether and how corporations, acting as they must through their employees, officers and directors, will fulfill their societal responsibilities.

As discussed *infra* at 22-23, government regulations are largely dependent upon self-policing by citizens, including corporate citizens, to ensure their proper execution. Similarly, the ever-increasing complexity of these laws cannot be denied. As a result, corporations necessarily have turned to their legal counsel for advice on how they can abide by the law.

Having noted these facts, however, it is too facile an observation to conclude that these "good citizenship" concerns will ensure that corporations will continue to seek the advice of counsel, regardless of the rule of privilege which might be applied. Concededly, in an elementary sense this is true. The fines and penalties which may be visited upon the corporate entity and its principals undeniably both have a deterrent effect and serve to encourage communication with counsel.[23] However, if the privilege is to have any meaning, the quality and quantity of the communication, and its relationship to the nature and character of legal counsel's advice, must be fully considered.

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[23] For example, the EPA in 1973 fined Ford Motor Co. $7 million after the company discovered and reported that some of its employees had unlawfully modified engines on its testing models. FORTUNE, April 1973 at 157.

See also IRON AGE, March 19, 1979 at 25 (Forrest L. Rettgers, Executive Vice President of NAM, noting "that the penalties associated with the infringement of laws by officials are growing more severe, *i.e.*, severe fines and jail sentences for criminal antitrust violations.").

Viewed from this perspective, a narrow construction of the "control group" of a corporation does not further the interests of the privilege. As Judge Hemphill noted:

> . . . [T]he only way that a lawyer can really understand how a corporation operates, what it is doing, and what it can do within the confines of the antitrust laws, is to go out into the branch offices and into the field to make the rounds with the salesmen. After the lawyer forms his or her opinion, it is of no immediate benefit to the chairman of the board or the president. It must be given to the corporate personnel who will apply it. If an attorney cannot make enquiries of salesmen and if the attorney cannot give advice to the corporate personnel who will apply it, then a corporation would be reluctant to seek legal advice since its confidential communications would not be protected by the attorney-client privilege. This court recognizes that *it is not the federal government that is primarily responsible for enforcement of the federal antitrust laws but rather the lawyers who advise their corporate clients.* Unless corporate personnel at a fairly low level can speak to attorneys in confidence, the enforcement of the antitrust laws is likely to be adversely affected.

Duplan, supra, at 1164 (emphasis supplied).

It is equally important to note that, unless the narrow standard of the Sixth Circuit is overturned, employees outside the control group may themselves become chary about seeking the advice of corporate counsel. That such reluctance to consult with a company's attorneys has not become manifest to date is due to several factors.

First, many employees themselves believe that the corporation's attorneys are their attorneys as well, at

least insofar as matters related to their employment are concerned.[24] As a result, lower and middle management employees regularly do meet with and seek the legal advice of the corporation's attorneys. To be sure, the practice of companies of assigning attorneys to branch or regional offices serves to confirm this belief.[25]

Second, there is no unanimity of thinking between and among the various federal courts as to who constitutes the "control group," and even some formulations of who is in the "control group" might be read to support the employee's view of existence of an attorney-client relationship. For example, Judge Kirkpatrick, in his original and very practical formulation of the control group test in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D.Pa. 1962), *mandamus denied sub nom., General Electric Co.* v. *Kirkpatrick,*

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[24] This observation is borne out by a recent study undertaken to explore the role and function of house counsel in American corporations. When asked who within the corporation had access to the legal staff, about 50 percent of the executives surveyed responded that "corporate executives" or "management personnel" had direct access, and 50 percent responded that "anyone employed by the corporation" had access. *A Comment on the Role, Structure, and Function of a Corporate Legal Department,* 14 Amer. Bus. Law Jour. 227, 228 (1976).

It is further documented by Boeing Company's vice president and general counsel who has reported that prior to 1976 Boeing had no corporate legal department. Rather, "all legal work had been done at the division level and by outside counsel." AVIATION WEEK & SPACE TECHNOLOGY, September 4, 1978 at 208.9.

[25] An example is United Technologies Corp. which according to its vice president and general counsel "is structured in the autonomous division concept, with legal staffs in each division." AVIATION WEEK & SPACE TECHNOLOGY, September 4, 1978 at 207.

312 F.2d 742 (3rd Cir. 1962), *cert. denied,* 372 U.S. 943 (1963), adopted a functional test when he stated:

> . . . [If] the employee making the communication *of whatever rank he may be,* is in control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.

210 F.Supp. at 485 (emphasis supplied). And, Judge Kirkpatrick went on to conclude that "it would be best to eliminate the idea that [a] line drawn on the organization chart [of the corporation] is to be considered for any purpose whatever." *Id.* at 486.

Clearly, however, courts have not been as flexible in the application of the "control group" test as its author had intimated. In the instant case, the Sixth Circuit stated that the "control group" included "a number of senior corporate officers, including the Chairman of the Board, the Vice Chairman, and the President . . . and possibly others." 600 F.2d at 1227. This tendency to identify the "control group" with senior management is consistent with the holdings in *In Re Grand Jury Investigation,* 599 F.2d 1224, 1237 (3rd Cir. 1979); *Congoleum Industries, Inc.* v. *GAF Corp.,* 49 F.R.D. 82 (E.D.Pa. 1969), *aff'd without opinion,* 478 F.2d 1398 (3rd Cir. 1973); *Garrison* v. *General Motors Corp.,* 213 F.Supp. 515, 518 (S.D.Cal. 1963); *Hogan* v. *Zletz,* 43 F.R.D. 308 (N.D.Okla. 1967), *modified on other grounds sub nom., Natta* v. *Hogan,* 392 F.2d 686 (10th Cir. 1968). At least one district court, however, has recently interpreted the "control group" more broadly as individuals who were not part

of senior management. *Hercules, Inc.* v. *Exxon Corp.*, 434 F.Supp. 136 (D.Del. 1977).

We respectfully suggest that this ambiguity inherent in most of the modern formulations of the "control group" test itself belies the optimism of those courts and commentators who see that test as drawing a "bright line" which provides certainty to employees and counsel alike.[26]

It would be inappropriate, however, to create such a bright line by delineating a "control group" with the narrow specificity suggested by the court below. For, it is not the ambiguity upon which this Court should focus, but the social utility of a more realistic evaluation and intepretation of the privilege.

IV.

We would respectfully suggest that the social utility of the privilege may be profitably explored in light of the three functions of corporate counsel identified on page 10 *supra*.

First, in the role of legal advisor, corporate counsel's principal concern is whether the institutional client is in compliance with the myriad of laws and regulations—federal, state and local—which impact upon the operations of the company.

There is widespread agreement on the view that this practice of "preventive law" long ago replaced the litigation function[27] as the chief service which lawyers perform for their corporate clients.

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[26] *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3rd Cir. 1979).

[27] By our repeated references to the preeminence of preventive law we do not mean to intimate that litigation is no longer a major

> The practice of preventive law should be the major focus of the corporate practitioner. If the practice of law is a prediction of what judges will do in practice, "preventive law," (i.e., a forward look in anticipation of and hopeful avoidance of future problems) is the essence of corporate law practice today.

B. Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity,* 34 Bus. Law 1797, 1804 (1979).[28]

Corporate executives also emphasize that they increasingly rely on their attorneys on a day-to-day basis for quick advice as they work their way through the regulatory maze that permeates corporate affairs:

> The single most important element in an effective preventive law program is sound day-to-day advice beginning with early involvement of lawyers in proposed transactions that may have significant legal consequences. This requires the lawyer's familiarity with the business and regular interchange between a corporate executive and his lawyer. Regular attendance at staff meetings, sales meetings, and talks on important subjects are essential. Inside counsel can also make significant contributions by working closely with various operating committees on groups, such as safety and environmental committees, alerting these specialists to

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concern of corporations. Just the opposite is true. Lawsuits filed in the federal courts from 1967-1972 in the area of fair employment, environmental, antitrust, labor, securities and patents, copyrights and trademarks almost doubled from the prior six year period, and corporations were involved in a great majority of those cases. FORTUNE, p. 65 (April 1973).

[28] See also, J. DeButts, *Client's View of Lawyer's Proper Role,* 33 Bus. Law. 1177, 1804 (1979).

legal trends or new legislation affecting their areas of responsibility.

34 Bus. Law. 1797 at 1805.[29]

The decentralization of the corporation, coupled with the staggering increases in government regulation, has encouraged—and even demanded—large increases in the numbers of in-house counsel employed by corporations and decreased the amount of legal work assigned to outside law firms.[30] For, as legal considerations become part of more and more corporate decisions, managers at all levels feel the need to have their attorney advisors close by for quick advice.[31]

It should be emphasized that the necessity for ready access to legal counsel is not limited to the officers and directors who make up the "control group" of the corporation. Indeed, as corporate structures become decentralized, many of the "recommendations" of lower and middle management are, *de facto,* the "decisions" of the corporation which, in some generalized sense, emanate from the "control group." As a practical matter, very often these "control group" decisions may be nothing more than the *pro forma* adoption of the reasoning and recommendations of lower echelon managers.[32]

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[29] We do not mean to suggest, of course, that the mere presence of legal counsel at such meetings make the discussions privileged. However, as explained more fully below, this involvement of corporate counsel in the affairs of the client gives rise to a more pervasive involvement with all levels of decision makers, making the privilege itself meaningful in a broader context.

[30] BUSINESS WEEK, July 16, 1979 at 40.

[31] As an example of the importance of the law to all corporate departments, one company estimates that their engineers spend as much as 30 percent of their time on legal matters. IRON AGE, March 19, 1979 at 24.

[32] M. Garber, *Privileged Communications—Who Can Speak for a Corporate Client,* 44 Mo.L.Rev. 350, 356 (1979).

Thus, if legal counsel is to serve both the institutional clients' interest and the larger societal interest in practicing preventive law, there must be unfettered communication between counsel and all levels of management who need to have, rely upon, and act upon the advice of counsel. *Duplan Corp., supra* at 12.

Perhaps nowhere is this need for communication more readily apparent than when one considers the corporate counsel's second role identified above; namely, as factfinder for the corporation. It is this still emerging form of the practice of preventive law, of course, that has given rise to this case.

The petitioners, believing that the corporation or one of its foreign subsidiaries may have made some questionable payments, voluntarily retained a law firm, at the corporation's expense, to ascertain whether any illegal payments had been made to foreign officials. When the law firm's report revealed irregularities, petitioners voluntarily reported them to the SEC and the IRS. The IRS issued an investigative summons and petitioned the court to enforce it when petitioners raised the attorney-client privilege and work-product defense.

Such voluntary compliance should be applauded and encouraged, especially in light of the fact that the Government lacks the personnel and other resources to successfully monitor compliance with every set of guidelines or standards promulgated with respect to every remedial statute. Former Secretary of Labor, John Dunlop, aptly stated the problem in his memorandum to the President of November 12, 1975.

> Legislation, litigation and regulations are useful means for some social and economic problems, but *today government has more regulation on its plate than it can handle.*

* * *

> *Compliance cannot be compelled through a police effort in every workplace* . . . greater emphasis should be placed on helping regulatees achieve compliance, especially through consultation. Trying to force compliance primarily through threats of inspections and stiff fines has not proved successful. It has worked against acceptance of the programs by isolating the regulators (and their expertise) from the regulatees and creating antagonism and distrust between the two. (Emphasis supplied.)

Moreover, it has long been recognized that our Internal Revenue system, which boasts one of the highest compliance rates in the world, relies heavily on voluntary taxpayer compliance.[33]

The Government cannot in good faith suggest that voluntary compliance with its programs is not a desirable and necessary end. Indeed, the SEC indirectly acknowledged that voluntary disclosure of questionable payments is to be encouraged by its policy of more lenient treatment of corporations which voluntarily disclose. *United States* v. *Upjohn,* 78-1 TC 83,597 (W.D. Mich. 1978). And, several courts have recently held that such disclosure to the SEC acts as only a limited waiver of the privilege itself. *Byrnes* v. *IDS Realty Trust,* 48 L.W. 2621 (S.D.N.Y. 1980); *In Re Grand Jury Subpoena Dated July 13, 1979,* 478 F.Supp. 368 (E.D. Wis. 1979).

It should be obvious that such efforts at voluntary compliance cannot be successful without internal communication which extend beyond the "control group." Almost by definition, "control group" members,

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[33] Annual Report of the Commissioner of Internal Revenue, p. 3, (1979).

especially in a decentralized corporation, cannot know all of the minute, detailed facts necessary to compliance and appropriate disclosure. And, it should be equally apparent that employees outside the "control group" may be ill-advised to disclose to corporate counsel, details of potential illegal activity in which they might be implicated unless the privilege applies.[34]

Thus, unless this Court acknowledges the existence of the attorney-client relationship in this setting and, *a fortiori,* the existence of the privilege, this second societal interest may be frustrated.

Finally, we come to the traditional role of legal counsel, that of legal advocate. As noted previously, it is in this context that courts confront attorney-client privilege claims directly. What we respectfully request this Court to keep in mind here, however, is that the "control group" test, by definition, provides only a "bare minimum of protection . . . [which] . . . no one has yet criticized as overly generous." *In re Grand Jury Investigation, supra,* 559 F.2d at 1235. The question properly before this Court, then, is "[w]hether the privilege should be enlarged . . . [to] serve the policy of full communication underlying the privilege itself." *Ibid.* (footnote omitted).

We submit that the factors discussed in this brief do militate in favor of a broader rule than enunciated by the Sixth Circuit Panel. Employees of a corporation do not communicate with corporate counsel for the purpose

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[34] There is also the ethical problem which corporate counsel faces as to whether there is a responsibility to advise individuals outside the "control group" that no attorney-client privilege attaches to their communication and that the employee may be unwittingly waiving his or her privilege against self-incrimination.

of creating a privilege in anticipation of litigation.[35] Rather, as we have demonstrated above, the exigencies of corporate managerial responsibility require unfettered access to counsel by a broad range of employees who "need to know" the advice and opinion of counsel. And, in order for counsel to be effective, the corporate attorney must be familiar with—and is oftentimes expected to be involved in—deliberations which lead to the development of policy at all levels of the corporate hierarchy. Viewed in this context, the corporation calls upon counsel's advocacy skills only when the attorney's skills as a legal advisor and factfinder have been exhausted. It is only at that point that the attorney's earlier labors are demanded by an adversary. We respectfully suggest that, notwithstanding the importance of the pursuit of truth to the adversarial process, the impetus to permit disclosure must be tempered by the other social values which are served by the application of a broader privilege than that permitted by the Sixth Circuit.

V.

We come, then, to the final issue raised in this litigation: whether the work product doctrine[36] may be invoked when the information at issue is demanded in an Internal Revenue Service ("IRS") administrative

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[35] It is important to note that the privilege does not apply to situations in which advice of counsel is sought in furtherance of an intended or present crime. *United States* v. *Hodge,* 548 F.2d 1347 (9th Cir. 1977). Furthermore, even protected communications lose the protection of the privilege if they are in aid of or in furtherence of a crime or fraud. *United States* v. *Mardian,* 546 F.2d 973 (D.C. Cir. 1976); *Garner* v. *Wolfinbarger* 430 F.2d 1093 (5th Cir. 1970), *cert. denied sub non Garner* v. *First American Life Insurance Co.,* 401 U.S. 974 (1971).

[36] *Hickman* v. *Taylor,* 329 U.S. 495 (1947); *See also,* Fed.R.Civ.P. 26(b)(3).

summons.[37] Curiously, the court below did not undertake any critical review of this doctrine, choosing instead to state in a footnote that the privilege is not applicable to an administrative summons issued pursuant to Internal Revenue Code (I.R.C.) § 7602.[38] We would respectfully suggest, however, that the same policy considerations which underlie the application of this privilege in civil and criminal litigation and the grand jury context apply with equal vigor to this administrative process.

It has long been recognized that the entire process, by which the IRS seeks the production of documentary evidence and enforces its authority to obtain such material in a federal district court, is an adversary proceeding. Once the IRS issues the summons, the party to whom it is directed may produce the summoned information or resist it by raising his defenses before the IRS hearing officer; and, if rebuffed there, by renewing his defenses in the federal district court. *Reisman* v. *Caplan*, 375 U.S. 440, 445-446 (1964). We submit that the uniquely adversarial character of this particular administrative proceeding makes it analogous to other civil and criminal adversarial proceedings and compels the application of the doctrine here.

Furthermore, the initiation of an IRS investigation is, essentially, but a preliminary step to a tax prosecution or determination of tax liability. The purpose of such an investigation is to gather sufficient information to determine whether the taxpayer has reported his cor-

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[37] Int. Rev. Code of 1954, §§ 7601-7611 provide, *inter alia*, for the examination of books and witnesses and the service and enforcement of the administrative summons.

[38] *United States* v. *Upjohn Co.*, 600 F.2d 1223, at 1228 n.13 (6th Cir. 1979).

rect tax liability, or whether there may be civil or criminal violations of the tax laws. Whether the taxpayer will be exposed to criminal or civil liability is dependent upon the information developed by the IRS in its investigation.

This Court has consistently recognized this dual purpose of the IRS upon issuance of a 7602 summons. *United States* v. *LaSalle National Bank,* 437 U.S. 298, 308 (1978); *Couch* v. *United States,* 409 U.S. 322, 326 (1973); *Donaldson* v. *United States,* 400 U.S. 517, 535 (1971). Indeed, "[t]he legislative history of the Code supports the conclusion that Congress intended to design a system with interrelated criminal and civil elements." *LaSalle National Bank, supra,* at 310.

It is this ultimate liability to which the taxpayer is exposed upon issuance of the summons which sharpens the adversarial nature of the investigatory process. Accordingly, preparation of a case for a hearing before an IRS agent pursuant to a 7602 summons presents the taxpayer and his attorney with many of the same problems with which they would be confronted in preparation for a court trial.

Properly viewed, then, the proceedings before the IRS hearing officer are adversarial in nature, and the substantive rights of a party under investigation are in equal jeopardy[19] in the context of this case, as in any other litigation which might cause the loss of liberty or property.

In view of the fundamentally adversary nature of these proceedings, it is not surprising that this Court,

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[19] Miller, *Administrative Agency Intelligence Gathering: An Appraisal of the Investigative Powers of the Internal Revenue Service,* 6 B.C.Ind. & Com.L.Rev. 657, 707 (1965).

sub silentio, approved the invocation of the work product defense in *Reisman, supra.* In that case, the taxpayer's attorney advanced a work product defense in response to an IRS summons directed to his client's accounting firm. 375 U.S. at 442. Although this Court found that the petitioner would have an adequate remedy in the enforcement proceeding (and, thus, did not address the question whether the documents in question constituted attorney work product), the Court emphasized the rights of "parties summoned and those affected by a disclosure [to] appear . . . before the District Court and challenge the summons by asserting their constitutional or other claims." 375 U.S. at 445 (citations omitted).[40] The Court went on to say, "[we] agree with that view and see no reason why the same rule would not apply before the hearing officer."[41] *Ibid.*

It is especially significant that the right to assert the work product privilege has been expressly affirmed in the context of grand jury proceedings,[42] to which the

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[40] Twenty-seven years prior to the decision in *Reisman,* Judge Learned Hand presaged the Court's conclusion when in dictum in an SEC summons enforcement proceeding he said, "we assume . . . that the conduct of investigations under this statute is subject to the same testimonial privileges as judicial proceedings . . ." *McMann* v. *SEC,* 87 F.2d 377, 378, (2d Cir. 1937) *cert. denied,* 301 U.S. 684 (1937). That dictum was adapted to an IRS enforcement proceeding in *Falsone* v. *United States,* 205 F.2d 734, 738, n.8 (5th Cir. 1953).

[41] *See also, Donaldson* v. *United States,* 400 U.S. 517 (1971), where the Court, in dictum, noted, that the "material sought . . . consists only of . . . routine business records . . . which are not the work product of [the taxpayer's] a attorney . . ." *Id.* at 530. There, again, the Court, *sub silentio,* recognized the applicability of the work product doctrine.

[42] *In Re Grand Jury Investigation, 599 F.2d 1224, 1228 (3rd Cir. 1979). In Re Grand Jury Supoena,* 599 F.2d 504, 509 (2d Cir. 1979). *Velsicol Chemical Corp.* v. *Parsons,* 561 F.2d 671, 676 (7th Cir. 1977). *In Re Grand Jury Proceedings (Duffy),* 473 F.2d 840,

IRS administrative summons and hearing has often been analogized.[43] The IRS, like the grand jury, "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Powell,* 379 U.S. 48, 57 (1964), citing *United States* v. *Morton Salt Co.,* 338 U.S. 632, 642-643 (1950). In addition, the IRS possesses an inquisitorial power to execute its investigative responsibilities. *Powell, supra* at 57. The IRS is not a disinterested inquisitor like a grand jury. Because the IRS is charged with the responsibility both to investigate tax liability and to enforce tax collection, there is a juxtaposition of the investigatory and prosecutorial functions.[44]

Unlike the grand jury, however, the investigative functions of the IRS are not supported "by the same historical and constitutional foundations that support a grand jury's investigative functions; and, thus possess none of the traditional safeguards against investigative abuse found to be operating in the grand jury context."[45] The grand jury stands between the accuser

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842 (8th Cir. 1973). *In Re Grand Jury Investigation (Sturgis),* 412 F.Supp. 943, 946-947 (E.D.Pa. 1976). *Matter of Rosenbaum,* 401 F.Supp. 807, 808 (S.D.N.Y. 1975). *United States* v. *Mitchell,* 372 F.Supp. 1239, 1245 (S.D.N.Y. 1973). *In Re Terkeltoub,* 256 F.Supp. 683, 685 (S.D.N.Y. 1966).

[43] *United States* v. *Powell,* 379 U.S. 48, 57 (1964); *United States* v. *Coopers and Lybrand,* 550 F.2d 615, 619 (10th Cir. 1977); *United States* v. *Cortese,* 540 F.2d 640, 642 (3rd Cir. 1976); *United States* v. *Matras,* 487 F.2d 1271, 1274 (8th Cir. 1973); *United States* v. *Widelski,* 452 F.2d 1, 4 (6th Cir. 1971); *United States* v. *McKay,* 372 F.2d 174, 176 (5th Cir. 1967); *Falsone* v. *United States,* 205 F.2d 734, 742 (5th Cir. 1953); *United States* v. *Amerada Hess Corp.,* 80-1, USTC 83,172, 83,177 (3rd Cir. 1980).

[44] Comment, *Constraints on the Administrative Summons Power of the Internal Revenue Service,* 63 Iowa L.Rev. 526, 534 (1977).

[45] *Ibid.*

and the accused. The IRS hearing officer does not; he is the accuser.

Finally, we note that the protections for which we are pressing are rooted in Constitutional considerations. First, there is the Fifth Amendment guarantee of due process. Admittedly, "[d]ue process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." . . . [W]hether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, . . . are all considerations which must be taken into account." *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960).

But, if due process means anything, it must include the right of the taxpayer to assert a meaningful defense against the government's expropriation of his liberty or property. Moreover, it cannot be denied that in most legal proceedings, and most assuredly, complex tax proceedings, a taxpayer, even a corporate taxpayer, cannot present a meaningful defense without the assistance of able counsel. It goes without saying, then, that due process would be reduced to no more than an illusion if parties summoned before the counts and the IRS are prevented from articulating defenses that militate in their favor.

Second, there is the Sixth Amendment guarantee of assistance of counsel in criminal prosecutions. It is axiomatic that assistance of counsel means "effective counsel." As discussed *supra*, at 26-27, criminal prosecutions may evolve from the investigations. To force an attorney to deliver over to the prosecutor, documents prepared to defend in litigation is to subvert entirely, the notion of effective counsel.

CONCLUSION

For the foregoing reasons, we respectfully urge that this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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